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Supreme Court of the United States

OCTOBER TERM, 1941

No......

JOHN D. MCCOACH, TRUSTEE,

Petitioner,

v.

J. ROB GRIFFIN, Administrator of the Estate of Robert D. Gordon, Deceased.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

YOUR PETITIONER respectfully submits his petition for a writ of certiorari directed to the record of the proceedings in the Circuit Court of Appeals for the Fifth Circuit, to bring such record here for revision and review of the decision of that court in the above entitled matter.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was brought in the United States District Court for the Northern District of Texas by Mrs. Fannie

V. Gordon, individually, and as next friend of her two minor children, against The Prudential Insurance Company of America, seeking to recover upon a policy of life insurance issued on the life of Robert D. Gordon. (R. 1.)

The insurance company answered by a Bill of Interpleader, which was allowed. The Bill of Interpleader named as cross defendants John D. McCoach, Trustee, John D. McCoach, Max I. Brenwasser, George B. Cody, Nathan Schweiger, Alfred D. Leonard, Frederick W. Mead, and Julius A. Bates. These parties answered, asking that the proceeds be awarded John D. McCoach, Trustee, who was named beneficiary in the policy. (R. 1, 2.)

Subsequently J. Rob Griffin was appointed administrator with will annexed of the estate of Robert D. Gordon, and was substituted in the cause as plaintiff. (R. 2.)

John D. McCoach, Trustee, and the other cross defendants were citizens of the State of New York; the plaintiff and the decedent were citizens of the State of Texas.

Gordon had dealings in New York with the cross defendants who formed the Middletown-Tex Oil Syndicate for the purpose of dealing with Gordon. (R. 2.) The Middletown-Tex Oil Syndicate was a common law association composed of McCoach and the other cross defendants. (R. 2.) Gordon procured a life insurance policy, payable to the association. (R. 2.) Some two years later this association ceased to do business due to financial reverses, and the seven members of that association formed a new association called the "Protection Syndicate." (R. 2.) McCoach was the Trustee of that association. The insurance policy was changed by Gordon to designate the Protection Syndicate and its indi-

vidual members as beneficiaries in place of the Middletown-Tex Oil Syndicate. (R. 3.)

The original policy was a term policy with the privilege of conversion into an ordinary life policy at the expiration of seven years. At that time Gordon converted the term policy into a new policy, with the individual members of the Protection Syndicate as beneficiaries. (R. 3.)

From the inception of Gordon's relations with the cross defendants he had borrowed money from them, and they had invested money in his oil enterprises in the State of Texas. (R. 3.) The policy of insurance was procured by Gordon to protect the loans and the investments these individuals and the association they comprised had made. (R. 17.) The premiums were paid by the association at Gordon's request upon his agreement to repay. However, neither the premiums nor any other loans or advancements were ever repaid by Gordon. (R. 2, 3.)

The loans and advancements made to Gordon exceeded the amount of the insurance policy. (R. 18.)

In 1934 Gordon agreed to relinquish his right to change the beneficiary and to receive disability payments and all other rights under the policy to the individual beneficiaries upon the association's agreement to pay to Gordon one-eighth of the proceeds of the policy received during his life time, and one-eighth of the proceeds of the policy to his wife at his death. (R. 4.) In surrendering these rights the last change of beneficiary was made, naming John D. McCoach, Trustee, as beneficiary. The naming of one individual rather than all was made at the suggestion of the insurance company, and McCoach was Trustee for the benefit of the former beneficiaries. (R. 5, 6.)

Subsequently three of the original members of the association assigned their interest in the policy. Two of these assignments were made for cash considerations, and the third was made by Alfred D. Leonard to his son, Leroy E. Leonard. There was no monetary consideration for the assignment from the elder to the younger Leonard, but it was made because the elder Leonard was unable to continue to pay his share of the premiums on the policy. (R. 6.)

None of assignees knew Gordon, never made any loans or advancements to him and never had any business dealings with him except to pay part of the premiums of the policy. None of the assignees were related to Gordon by blood or marriage. (R. 7.) The assignors admittedly had an insurable interest. (R. 7.)

In the District Court the insurance company was discharged with its fees and costs, and the controversy over the funds was decided in favor of McCoach, Trustee. (R. 1, 19.) An appeal was taken limited to the amount that would go to the assignees. (R. 7.) The case was submitted on appeal to the Fifth Circuit Court of Appeals, and the judgment of the lower court in favor of McCoach, Trustee, was affirmed. A writ of certiorari was granted by this court, and on June 2, 1941 the cause was remanded for determination of the law of Texas, as applied to the circumstances of this case (313 U. S. 498.)

After reargument the Circuit Court on November 15, 1941 reversed the judgment of the lower court and the cause was remanded with directions to enter judgment in favor of J. Rob Griffin. (R. 25.) Motion for rehearing was filed on the 6th day of December, 1941, which motion was thereafter overruled by the Circuit Court of Appeals with-

out written opinion on the 30th day of December, 1941. (R. 25, 28.) The time for filing this application was extended until April 15, 1942 by an order of this court dated March 27, 1942. (R. 28.)

QUESTIONS PRESENTED

1. In determining the applicable state law under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, are the lower courts bound by the latest pronouncement of the highest court of the state in which they sit, or can they rely upon pronouncement of such courts which have later been expressly overruled?

2. In determining the applicable state rules involving a conflict of laws question, can the lower courts ignore the local conflict of laws rule and apply the internal rule?

3. Where there is no express ruling by the state court of the state in which the Federal Court sits on the point involved, what rule governs the lower courts under the doctrine of *Erie Railroad Co. v. Tompkins?*

JURISDICTION

The jurisdiction of this court is invoked and believed to be sustained under *Section 240 (a) Judicial Code* [*28 U. S. C. A. 347 (a)*] as amended by Act of Congress of February 13, 1925.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(a) The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local statutes and decisions.

This involves an interpretation of *Article 5048, Revised Civil Statutes of Texas, 1925*, and the decision of the Texas Commission of Appeals (opinion adopted by the Supreme Court) in *Brammer v. Wilder*, 57 S. W. (2d) 571, wherein it was specifically held that the rule laid down in *Cheeves v. Anders* has been changed, *Cheeves v. Anders* being the case principally relied upon by the Circuit Court of Appeals.

Further this involves inquiry as to whether the case of *Cheeves v. Anders* and those following it have not been overruled by the decision of the Commission of Appeals of Texas (opinion adopted by the Supreme Court) in *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612.

(b) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Griffin v. McCoach*, 313 U. S. 498, and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, which holds that Federal Courts in diversity of citizenship cases are governed by the conflict of laws rule of the courts of the state in which they sit, rather than by the internal rule where a conflict of laws question is presented.

(c) If petitioner be mistaken in the effect of the holding of the cases cited in (b), then the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court, in that by failing to take into consideration and discuss the Texas conflict of laws rule, and applying without comment its internal rule, it has in effect held that in cases involving a conflict of laws question, that the Federal Courts may apply the internal rule of the state in which they sit rather than its conflict of laws rule, even though the two rules be different.

(d) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Wade v. Travis County, Texas*, 174 U. S. 499; *Grovey v. Townsend*, 295 U. S. 45; *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538; and *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, which hold that Federal Courts should apply the latest pronouncements of the highest state court even though such pronouncement is in conflict with or overrules earlier holdings.

(e) The decision of the Circuit Court establishes a rule in conflict with the rule on the same matter established by Circuit Courts for the Seventh and Eighth Circuits in *Alexander v. Missouri State Life Ins. Co.*, 68 F. (2d) 1; *Layne-Western Co. v. Buchanan County, Mo.*, 85 F. (2d) 334; and *Yoder v. Nu-Enamel Corporation*, 117 F. (2d) 488, which hold that where decisions of a state court are conflicting the most recent pronouncement must be accepted by the Federal Courts as declaring the law of the state.

(f) The decision of the Circuit Court is in conflict with the decision of Fourth Circuit in *New England Mutual Life Ins. Co. v. Mitchell*, 118 F. (2d) 414 (cert. denied) which holds that dicta in opinions of state courts is not binding on the Federal Courts in determining the applicable state law.

(g) The Circuit Court of Appeals has so far departed from the accepted and usual judicial course of procedure, as to call for the exercise of this court's power of supervision. Although the highest court of the State of Texas has held that insofar as conflict of laws cases are concerned, the public policy of the State of Texas is determined by legislative enactment only, the Circuit Court of Appeals has held that the public policy of the State of Texas results from both legislative and judicial enactment relying on two decisions neither of which are Texas cases.

(h) The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, in that it has held that under the Texas law insurance policies are not subject to assignment to parties have no insurable interest in the life of the insured. This is in conflict with the holding of the highest court of the State of Texas in *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612.

(i) Likewise the Circuit Court of Appeals has erroneously held that the assignments were made to parties having no insurable interest, and there is no finding to sustain such a conclusion.

CONCLUSION

The decision of the Circuit Court of Appeals erroneously construes the legal effect of the agreed facts in this cause. It applies to these facts rules drawn from superseded decisions which have no application, and fails to follow the rules and principles of the decisions of this court.

WHEREFORE, premises considered, your petitioner respectfully prays that a writ of certiorari issue under the seal of this court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit in the above cause, and that the record be removed to this court, and that the decree of the lower court be reversed.

Respectfully submitted,

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